

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company,)	
AT&T Communications of Illinois, Inc.,)	
TCG Illinois, TCG Chicago, TCG St. Louis,)	
CoreComm Illinois, Inc., WorldCom Inc.,)	
McLeodUSA Telecommunications Services, Inc.,)	
XO Illinois, Inc.,)	
Northpoint Communications, Inc.,)	
Rhythms NetConnection and Rhythms Links, Inc.,)	
Sprint Communications L.P.,)	
Focal Communications Corporation of Illinois, and)	
Gabriel Communications of Illinois, Inc.)	
)	
)	Docket No. 01-0120
Petition for Resolution of Disputed Issues)	
Pursuant to Condition 30 of the)	
SBC/Ameritech Merger Order)	
)	
)	

ILLINOIS COMMERCE COMMISSION
STAFF'S RESPONSE TO AMERITECH'S MOTION
TO ABATE OR, IN THE ALTERNATIVE, TO DEFER DECISION

NOW COMES the Staff of the Illinois Commerce Commission ("Staff"), by and through its attorneys, and pursuant to Section 200.190 of the Illinois Administrative Code, (83 Ill. Adm. Code 200.190), states, in response to Ameritech's motion to abate or, in the alternative, to defer decision, the following:

1. On Friday, June 7, 2002, at approximately 5:40 pm, and in any case after the close of business, the Illinois Bell Telephone Company ("Ameritech" or "AI") took the extraordinary step of filing a pleading styled "Motion to Abate, Or, in the Alternative, to Defer Decision" ("Motion"). This Motion is prejudicial in both its timing and the relief it

seeks. In its Motion, Ameritech claims, based upon AI's assumption that the Plan would expire October, 2002, that "a decision in this docket at this time would be extremely limited in duration...." Ameritech Motion at 1. Ameritech also claims that a decision in this docket would be "unnecessary and better deferred" for a number of reasons. Id. Ameritech, more specifically, is claiming that the record in this proceeding and the Proposed Order fail to "reflect . . . two critical developments that occurred since the record was closed." These "critical developments" include, according to Ameritech, "ongoing improvements in Ameritech Illinois' wholesale performance since December 2000" and (2) "modifications to the existing plan, which Ameritech Illinois has been developing to address the *principal* issues raised by Staff, competing local exchange carriers ("CLECs"), and the Proposed Order." Ameritech Motion at 1-2. (Emphasis added.)

2. In essence, Ameritech is arguing that it is more efficient for the Commission to dismiss this docket, after the parties have already spent considerable time and resources seeking and analyzing data, developing alternative remedy plans, supporting their recommendations through testimony, briefs, and briefs on exception, in favor of spending similar time and resources to analyze a new proposed plan (a plan that, moreover, will *necessarily* be less favorable to the parties than the plan established pursuant to the Proposed Order) that will be voluntarily proposed by Ameritech (and perhaps even as equally voluntarily withdrawn) and, even more incredibly, a plan that Ameritech has not yet unveiled. Ameritech's request is untimely, and improper, and the relief it seeks is inappropriate, prejudicial and will result in egregious administrative inefficiency. AI's Motion should not be granted.

3. Procedurally, Staff objects to Ameritech's Motion on several grounds: it is untimely, is inappropriately characterized as a Motion to Abate, when it is actually a Motion to Dismiss, and does not sufficiently describe the proposed plan that allegedly provides the rationale that supports its Motion.

4. Ameritech's Motion is improperly characterized as a Motion to Abate or Defer. If it were, this docket would at some point resume where it left off after being deferred or abated. It is clear from AI's Motion (requesting that the Commission examine the remedy plan that it intends to propose in the 271 docket) that AI never intends to have the Commission issue an order in this docket. Indeed, Ameritech alleges that "...any order in this proceeding would be of extremely limited duration" apparently believing that, if this were true, it follows that the Commission should not bother ever issuing its order in this docket. Consequently, if indeed, as Ameritech apparently believes, Condition 30 expires in October, 2002, any deferral of this docket beyond October, 2002 would actually permit Ameritech to seek, at that point, the dismissal of this docket on the grounds that the merger condition expires. Thus, Ameritech's Motion would more accurately be characterized, and understood, as a Motion to Dismiss. Ameritech, however, did not characterize its Motion as such because it could not cite any valid grounds for dismissal. Moreover, Ameritech did not support its Motion on those grounds.

5. Ameritech's rationale supporting its Motion, even if found persuasive, would not support the relief it seeks. Ameritech seeks to have the Commission abate or defer indefinitely this docket because of "two critical developments that occurred since the record was closed." *Id.* These alleged developments include alleged improvement

in wholesale performance data and a new proposed plan that Ameritech is developing but has not yet revealed. Unfortunately for Ameritech, new performance data, even if it showed an improvement, would be irrelevant to issues considered in this docket and thus would not support its Motion. The remedy plan methodology addressed in this proceeding would not be altered by any new data, regardless of whether the new data shows an improvement in Ameritech's wholesale performance or not. Likewise, the intention to propose a compromise plan in the future is also irrelevant and would not support a Motion to Abate or Defer unless there was substantial evidence that the other parties agreed to accept this plan as a unanimous settlement. Since the other parties have not even been allowed to know what Ameritech's proposal is, this is clearly not the case. Finally, Ameritech, in basing its Motion on these facts not in evidence, violates Section 200.190 (c) by not providing supporting affidavits.

6. Ameritech appears, in large part, to base its Motion on the fact that there is more current data available and that this data is more favorable to Ameritech's positions in this docket than the data contained in the record. Staff notes, however, each and every month brings new wholesale performance data. Under Ameritech's apparent reasoning, there could be a perpetual docket to accommodate the latest in Ameritech's wholesale performance if, that is, the latest data is favorable to Ameritech. This, of course, is absurd. Beyond the obvious unfairness of an approach under which Ameritech could pick and choose the data on which to evaluate Ameritech's wholesale performance, Staff objects to the chaos and confusion such a constantly moving target would present.

7. Furthermore, if Ameritech's performance is improving, as it alleges, Ameritech should be less concerned about *any* remedy plan since as Ameritech's performance improves, Ameritech will pay fewer penalties. Certainly, Ameritech has no reason to be concerned that the 01-0120 remedy plan will require Ameritech to pay *more* penalties because of improved performance and, of course, Ameritech does not allege this. Rather, Ameritech's argument is that its improved performance proves that the existing plan (the Texas remedy plan) is effective. Id. at 1-2.

8. Based upon its argument, Ameritech asks the Commission to draw two conclusions, both of which are erroneous. The first conclusion is that Ameritech's improved performance is directly related to the existing plan and not for some other reason or causes (like Ameritech's pending 271 application). Clearly, any number of other causes could be responsible for improved performance on the part of Ameritech, including, Ameritech's reallocation of resources to comply with Commission orders or inaccurate tracking of performance and application of the remedy plan formulas.

8. The second erroneous conclusion is that the 01-0120 plan will not provide any additional benefits over and above the existing plan and, therefore, issuing an order in this docket to supplant the existing plan is unnecessary. By proposing to make changes to its existing plan to address the principal issues of Staff, CLECs and the Proposed Order, Ameritech concedes, however, that there *is* value in modifying its existing plan. As a result, even Ameritech acknowledges that the existing plan should be improved.

9. Moreover, Staff argues that there is a great deal of benefit in the Commission issuing an order adopting a Remedy Plan in this proceeding. First, and

foremost, the Commission would be satisfying its duties to the customers of Ameritech under the Commission's statutory merger approval authority (see, Section 7-204 of the Public Utilities Act) by not abandoning one of the conditions, imposed by the Commission under such authority, prior to its satisfaction.

10. Second, a Commission ordered plan will provide some direction to the parties in both the 271 docket and in the Part 731 rulemaking as to the necessary elements of an Illinois Remedy Plan that satisfies the Commission's goals. Staff, and a number of other parties, are basing their positions in those dockets on the results of this docket. If this docket is never completed, the parties will lose the benefits of a Commission approved remedy plan. The guidance that Staff seeks from the Commission would be lost and would bring great uncertainty to a number of dockets. As a result, even if the Remedy Plan in this proceeding expires in October, as Ameritech argues, having a final Commission approved plan, even if implemented for only a short time, has value by giving the Staff and CLECs at least a few months of data under the Commission approved plan to compare with the existing plan data, and to provide insight into any other plans that may be proposed by Ameritech. The current uncertainty benefits no party other than Ameritech who hopes to impose a lesser plan on the other parties by these procedural maneuvers.

11. Ameritech's Motion is untimely because any alternative or compromise plans Ameritech sought to propose should have been raised in the course of the proceeding, not after the record is closed. Staff and the CLECs have spent considerable scarce resources participating in extensive collaboratives, discovery, filing of testimony, full evidentiary hearings, and a full briefing schedule. At this late and

critical juncture of this proceeding, Ameritech now comes forward with this Motion clearly calculated to prejudice the interests of the parties in this docket and in other ongoing dockets by squandering all of the extensive resources that have already been expended in this proceeding. Because the timing of the Motion comes at such an obviously late juncture in this proceeding and would clearly result in a grossly unfair treatment of Staff and the CLECs in violation of Code Part 200.25¹ (83 Ill. Admin. Code 200.25), it should be denied out of hand.

12. Ameritech's Motion is fatally vague because it is based upon knowledge that only Ameritech has. Ameritech's so called "*compromise* remedy plan" is not a compromise at all. The word compromise is defined as: "A settlement of differences in which each side makes concessions." See e.g., The American Heritage Dictionary, 3rd edition, 1994. Since Ameritech declines at this point to share the particulars of its "compromise remedy plan" with the parties, no party can predict what Ameritech intends to propose. It is inaccurate for Ameritech to refer to its proposal as a "compromise plan" when Ameritech, unilaterally, is controlling its parameters as well as the timing of its release to the parties. This is not a settlement plan that the parties have agreed to in the give and take of negotiations. Even if it were a settlement, unanimously agreed to by the parties, it should be brought to the Commission in this docket, not in the 271 proceedings.

13. Ameritech is requesting that the ALJs, Staff, and all the other parties to this proceeding agree to abandon the extensive work they have already invested in this proceeding based upon nothing more than pure speculation that Ameritech is in fact

¹ Code Part 200.25 provides, in relevant part, that: "Persons appearing in and affected by Commission proceedings must be treated fairly. To this end, parties which do not act diligently and in good faith shall be treated in such a manner as to negate any disadvantage or prejudice experienced by other parties."

modifying the existing plan (the Texas remedy plan), a plan that was in many critical aspects rejected by the parties to the collaboratives and the ALJs in their Proposed Order, to address the “principal” issues raised by Staff, the CLECs and the ALJs in their Proposed Order. Ameritech, apparently, presumes that it knows better than Staff, the CLECs, and the ALJs just exactly which issues are their respective “principal” issues. Ameritech, moreover, also presumes that it knows better than Staff, the CLECs, and the ALJs how best to satisfy the concerns of these parties. In addition, Ameritech apparently also presumes that it knows better than the Commission (since it seeks to prevent a Commission decision on these issues) what is the appropriate plan for Illinois.

14. Staff believes it is highly unlikely that Ameritech’s alleged “compromise plan” will accurately mirror the positions of Staff, the CLECs and the ALJs. Otherwise, Ameritech would live with the remedy plan as proposed in the Proposed Order.

15. Moreover, Al’s Motion seeks to supplant the Commission’s judgment with its own judgment and to do so immediately before the Commission is scheduled to consider the Proposed Order. Ameritech now seeks to have the Commission abandon, not only its decision-making authority in this proceeding, but also its directives in the Merger Order. Now, when the light can finally be glimpsed at the end of the tunnel, for Ameritech to propose that the Commission abandon its requirements in the Merger Order, is absurd.

16. Ameritech also fails to provide the Commission with any rational, compelling reason to abate or, in the alternative, to defer, its decision in this proceeding. Regarding Ameritech’s proposed modifications to the “existing plan,” Ameritech can continue to modify the “existing plan” and propose that plan in settlement negotiations

outside of any docket. If there is general agreement, Ameritech could seek, at that time, Commission approval. Moreover, any proposed alternative plan can be negotiated concurrently with this docket (but outside of it) without any negative impact.

17. Ameritech argues that the 271 proceeding is the most appropriate proceeding for consideration of its “to be proposed” plan. The implication of Ameritech’s argument is that consideration in the 271 proceeding is the most efficient way to proceed. That is incorrect for a number of reasons. Much of the work that has been done in this docket will have to be repeated in another proceeding unless a unanimous settlement is stipulated (which is doubtful in light of the recent failures of the regional plan negotiations). If a new plan is proposed, additional discovery will have to be undertaken to obtain data and test it in the programming format of the newly proposed remedy plan. Ameritech, in a recent filing in the 271 proceeding, woefully underestimates that this preliminary discovery period prior to filing testimony would be approximately four weeks.

18. In addition, testimony has already been filed in the 271 proceeding, and hearings will commence next week. Any consideration of this issue in that docket will not, in all likelihood, even commence until after the hearings are held and considering the complexity of the issues, will probably extend beyond October, 2002. If the Commission grants Ameritech’s Motion in this docket, the possibility exists that no remedy plan will ever be approved by this Commission. Under Section 271, the Commission’s role is to make a recommendation, which the FCC may or may not adopt. One wonders if Ameritech seeks to prevent the Commission from doing anything more

than making a recommendation regarding a remedy plan, leaving the outcome of the remedy plan solely in Ameritech's control.

19. Ameritech also bases its Motion in part on the premise that "a decision in this docket at this time would be extremely limited in duration" because the Proposed Order agreed with Ameritech's position that Condition 30 of the Merger Order will expire this October. The Commission, however, is the ultimate decision-making authority and it has not yet decided this issue. In fact, the purpose of Ameritech's Motion is to preclude the Commission from considering the Proposed Order and deciding the issues in this proceeding, including the issue of whether Condition 30 expires this October. Again, Ameritech seeks to improperly usurp the Commission's decision-making authority with its own unilateral decisions. Ameritech, moreover, implies throughout its Motion that a decision issued in this proceeding is of limited, if any, value. Such notions are simply not true. As Staff has already noted, the Remedy plan that ultimately issues forth from this docket is likely to be adopted and incorporated into Part 731 of the Commission's Rules. That reason alone is sufficient for the Commission to consider the Proposed Order that has already been issued in this proceeding.

20. As for Ameritech's commitment to voluntarily have in place the existing Texas remedy plan in order to cover the potential "gap" between the time Condition 30 may expire and the time until Code Part 731 would be in effect, this is not a new proposal. Ameritech proposed this in the course of the proceedings. Staff's preference has always been that, if there is a gap, the gap period be covered by the 01-0120 remedy plan adopted pursuant to the Commission's authority under alternative regulation or Section 712(g).

21. Perhaps what is most important about Ameritech's Motion is what is explicitly left unsaid, yet hinted at in Ameritech's Motion. Ameritech's primary reason for the timing of filing its Motion appears to be that it does not like many of the conclusions the ALJs reached in the Proposed Order, and which same conclusions it is deeply concerned that the Commission will adopt. As Ameritech briefly notes in the Motion, Ameritech has consistently advocated, in this proceeding and others, that the Texas plan is sufficient for Illinois because it has received the FCC stamp of approval in the Texas and other SWBT territory states' 271 proceedings. Having fought tooth and nail to keep out unwanted modifications to its Texas remedy plan in the collaboratives, and subsequently in this proceeding, Ameritech, finding no other appropriate methods to fend off such undesired modifications of the Texas plan and, perhaps seeing the writing on the wall, now employs this last-ditch effort to forestall the inevitable by filing this unprecedented and inappropriate motion. Ameritech's Motion should be denied out of hand.

WHEREFORE, for all of the reasons articulated above, the Staff of the Illinois Commerce Commission respectfully requests that Ameritech's Motion to Abate, Or, in the Alternative, to Defer Decision be denied.

Respectfully submitted,

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Commission

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